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No. 99-1878

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN G. STRAND, JOHN C. SHEA, and DAVID A. SVANDA, Commissioners of the Michigan Public Service Commission

Petitioners,

v.

MICHIGAN BELL TELEPHONE CO. and CLIMAX TELEPHONE CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICI CURIAE BRIEF OF THE STATE COMMISSIONS OF PENNSYLVANIA, ARKANSAS, CALIFORNIA, FLORIDA, HAWAII, KENTUCKY, MAINE, MARYLAND, MONTANA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, TENNESSEE, UTAH, VIRGINIA AND WISCONSIN, AND THE STATES OF DELAWARE, INDIANA AND OHIO SUPPORTING PETITIONERS

MARYANNE REYNOLDS MARTIN *
Assistant Counsel
CARL S. HISIRO, Assistant Counsel
FRANK B. WILMARTH, Deputy Chief
BOHDAN R. PANKIW, Chief Counsel
203 North Office Building
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

* *Counsel of Record On Behalf of Amici States*

[Additional Counsel Listed Inside]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

26 P

ARTHUR H. STUENKEL
Attorney for the Commission
1000 Center St., P.O. Box 400
Little Rock, Arkansas 72203-0400
(501) 682-5877

Counsel for Arkansas Public Service Commission

PETER ARTH, JR.
General Counsel
MARY MCKENZIE
Assistant General Counsel
DALE HOLZSCHUH
Public Utilities Counsel
505 Van Ness Avenue
San Francisco, California 94102
(415) 452-4070

Counsel for California Public Utilities Commission

M. JANE BRADY
Attorney General
Department of Justice
820 North French Street
Wilmington, Delaware 19801
(302) 577-8400

Counsel for State of Delaware

CATHERINE BEDELL
General Counsel
DAVID E. SMITH
Director of Appeals
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0862
(850) 413-6248

Counsel for Florida Public Service Commission

JOAN YAMAGUCHI
Chief Counsel
JI SOOK KIM
Commission Counsel
465 South King Street
Room 103
Honolulu, Hawaii 96813
(808) 586-2020

Counsel for Hawaii Public Utilities Commission

KAREN M. FREEMAN-WILSON
Attorney General of Indiana
219 Statehouse
Indianapolis, Indiana 46204
(317) 232-6255

Counsel for State of Indiana

DEBORAH T. EVERSOLE
General Counsel
AMY E. DOUGHERTY
Staff Attorney
211 Sower Boulevard
P. O. Box 615
Frankfort, Kentucky 40602
(502) 564-3940

Counsel for Kentucky Public Service Commission

JOANNE B. STENECK
General Counsel
242 State Street
18 State House Station
Augusta, Maine 04333
(207) 287-3831

Counsel for Maine Public Utilities Commission

SUSAN STEVENS MILLER
General Counsel
6 Saint Paul Street
Baltimore, Maryland 21202
(410) 767-8039

Counsel for Maryland Public Service Commission

ROBIN A. MCHUGH
Chief Counsel, Special Assistant Attorney General
1701 Prospect Avenue
P. O. Box 202601
Helena, Montana 59620-2601
(406) 444-6376

Counsel for Montana Public Service Commission

JEFF E. PARKER
General Counsel
DAVID S. NOBLE
Assistant General Counsel
1150 East William Street
Carson City, Nevada 89701-3109
(775) 687-6008

Counsel for Public Utilities Commission of Nevada

GARY EPLER
General Counsel
8 Old Suncook Road
Concord, New Hampshire 03301
(603) 271-2431

Counsel for New Hampshire Public Utilities Commission

LAWRENCE G. MALONE
General Counsel
CARL F. PATKA
Assistant Counsel
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-2510

Counsel for Public Service Commission of the State of New York

MICHAEL F. EASLEY
Attorney General
JAMES C. GULICK
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 716-6900

Counsel for North Carolina Utilities Commission

BETTY D. MONTGOMERY
Attorney General
STEVEN T. NOURSE
Principal Attorney
180 East Broad Street, Ninth Floor
Columbus, Ohio 43215-3793
(614) 466-4395

Counsel for State of Ohio

BOHDAN R. PANKIW
Chief Counsel
FRANK B. WILMARTH
Deputy Chief Counsel
MARYANNE REYNOLDS MARTIN
Assistant Counsel
CARL S. HISIRO
Assistant Counsel
203 North Office Building
P.O. Box 3265
Harrisburg, Pennsylvania 17105-3265
(717) 787-5000

Counsel for Pennsylvania Public Utility Commission

JOHN R. COLLIER
General Counsel
460 James Robertson Parkway
Nashville, Tennessee 37243-0505
(615) 741-3191

Counsel for Tennessee Regulatory Authority

SANDY MOOY
Legal Counsel
Heber M. Wells Building,
Fourth Floor
160 East 300 South
Salt Lake City, Utah 84111
(801) 530-6716

Counsel for Public Service Commission of Utah

WILLIAM H. CHAMBLISS
General Counsel
DON R. MUELLER
Associate General Counsel
Tyler Building
1300 East Main Street
Richmond, Virginia 23219-3630
(804) 371-9671

Counsel for Virginia State Corporation Commission

MICHAEL S. VARDA
Assistant General Counsel
610 North Whitney Way
P.O. Box 7854
Madison, Wisconsin 53707-7854
(608) 267-3591

Counsel for Public Service Commission of Wisconsin

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INTERESTS OF THE AMICI STATES

The Pennsylvania Public Utility Commission, Arkansas Public Service Commission, California Public Utilities Commission, State of Delaware, Florida Public Service Commission, Hawaii Public Utilities Commission, State of Indiana, Kentucky Public Service Commission, Maine Public Utilities Commission, Maryland Public Service Commission, Montana Public Service Commission, Public Utilities Commission of Nevada, New Hampshire Public Utilities Commission, Public Service Commission of New York, North Carolina Utilities Commission, State of Ohio, Tennessee Regulatory Authority, Public Service Commission of Utah, Virginia State Corporation Commission, and Public Service Commission of Wisconsin (hereinafter "Amici States") submit this brief in support of Petitioners John G. Strand, John C. Shea, and David A. Svanda, Commissioners of the Michigan Public Service Commission. The Amici States have obtained the written consent of all parties to this proceeding to file this brief.[1]

The Amici States are either State Attorneys General representing the broad interest of the State or State administrative agencies with broad regulatory authority over public utility companies, including regulatory jurisdiction with respect to intrastate operations of telecommunications carriers.[2] Each of the State agency *amici* is a "State commission" under section 252 of the federal Tele-

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[1] No counsel for a party authored the brief in whole or in part and no persons other than the Amici States made a monetary contribution to the preparation of this brief.

[2] The Virginia State Corporation Commission, having regulatory authority over public utility companies, is a "permanent commission" established by Article IX, Section 1, of the Constitution of Virginia, and is not an executive branch agency.

communications Act of 1996 (the Act).[3] The instant case involves the sovereign immunity of State commissions and the immunity of the individual commissioners who serve on those State commissions. Thus, the Amici States have a vital interest in the ultimate outcome of the instant case.

An additional interest is that State commissions across the country are allocating scarce resources to challenge federal court jurisdiction in pending section 252(e)(6) actions under the Act. There are at least five other Circuit Courts of Appeal and numerous district courts presently considering the scope of the sovereign immunity defense in section 252(e)(6) actions.[4] Granting the writ petition and issuing a decision in

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[3] 47 U.S.C. § 252; 47 U.S.C. § 153(41) (defining "State commission" as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.").

[4] *BellSouth Telecommunications, Inc. v. North Carolina Util. Comm'n*, Nos. 99-1845 *et al.* (4th Cir. filed June 21, 1999) and *Bell Atlantic-Maryland, Inc. v. MCI Worldcom, Inc.*, Nos. 99-2459, *et al.* (4th Cir. filed October 29, 1999), argued seriatim May 1, 2000; *AT&T Communications v. BellSouth Telecommunications, Inc.*, No. 99-30421 (5th Cir. filed April 12, 1999); *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir.), *denial of reh'g vacated and reh'g granted*, 183 F.3d 567 (7th Cir. 1999) (reargued Dec. 2, 1999); *Wisconsin Bell, Inc. v. Public Serv. Comm'n of Wisconsin*, Nos. 99-2805 *et al.* (7th Cir. filed July 21, 1999); *U S West Communications, Inc. v. Garvey*, Nos. 99-3071, *et al.* (8th Cir. filed July 30, 1999); *Southwestern Bell Telephone Co. v. Connect Communications Corp.*, No. 99-3953 (8th Cir. filed Oct. 21, 1999); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, No. 00-13505FF (11th Cir. filed July 7, 2000). The Kentucky Commission also has a pending jurisdictional challenge in the Sixth Circuit. *MCI Telecommunications Corp. v. BellSouth Telecom-munications, Inc.*, Nos. 99-5839 and 99-5873 (6th Cir. filed June 14, 1999). In addition, similar actions are pending in numerous district courts across the country. A small sampling of cases include the following: *MCI Telecommunications Corp. v. New York Tel. Co.*, No. CV-97-1600 (N.D.N.Y. filed October 31, 1997); *Illinois Bell Tel. Co. v. ICC*, No. 98 C 2686 (N.D. Il. filed May 1, 1998); *U S West Communications, Inc. v. Montana Pub. Svc. Comm'n*,

the instant case will provide the necessary direction to resolve these important jurisdictional disputes and allow the courts, State commissions, and carriers to turn their attention to substantive disputes arising from interconnection agreement determinations made by State commissions.

In support of the Petitioners' request for a writ of certiorari, this brief contains entirely new arguments not heretofore advanced by the parties in this case.

SUMMARY OF ARGUMENT IN FAVOR OF GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit has decided an important question of federal law that has not been, but should be, settled by this Honorable Court. Contrary to the constitutional doctrine of sovereign immunity, the Court of Appeals below has decided that the individual members of a State commission may be sued in federal court without their consent when the State commission makes a determination to approve or reject an interconnection agreement under section 252 of the Telecommunications Act of 1996, 47 U.S.C. § 252. The Sixth Circuit held erroneously that it could lift the jurisdictional bar pursuant to the *Ex parte Young* doctrine.[5]

No. CV98-42-H-CCL (Mont. filed October 7, 1998); *Ameritech Ohio v. ICG Telecom and the PUCO Commissioners*, Case No. C2-99-552 (S.D. Ohio filed June 11, 1999); *Pacific Bell v. California Pub. Util. Comm'n*, No. C 99-4479 CW (N.D. Cal. filed Aug. 25, 1999); *Nevada Bell v. Pubic Util. Comm'n of Nevada*, No. CV-N-99-492-ECR(PHA) (Nev. filed Sept. 3, 1999); *Pacific Bell v. Pac-West Telecommunications*, No. C 99-4480 CW (N.D. Cal. filed Oct. 6, 1999); and *Bell Atlantic-Pa., Inc. v. Pennsylvania Pub. Util. Comm'n*, No. 99-CV-5391 (E.D. Pa. filed Oct. 29, 1999).

[5] *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862 (6th Cir. 2000). *Accord MCI Telecommunications Corp. v. Public Serv. Comm'n of*

The Court of Appeals' decision must be reversed and the underlying complaint dismissed. The *Ex parte Young* [6] doctrine does not apply for a number of reasons. In addition to those reasons set forth by Petitioners,[7] the Amici States assert that *Ex parte Young* does not apply because the State is the real party in interest; the constitutional doctrine of sovereign immunity bars suit

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Utah, No. 99-4203 (10th Cir. June 20, 2000) (2000 U.S. App. LEXIS 14348)(following Sixth Circuit's rationale).

[6] See *Ex parte Young*, 209 U.S. 123 (1908) (permitting a remedy against a state official who was seeking to enforce facially unconstitutional conduct on the grounds that the official was individually subject to the injunctive power of the court as his unlawful conduct stripped him of his official status and such remedy was necessary to protect the supremacy of federal law.)

In contrast to *Ex parte Young*, Congress has invited, if not directed, State commissions to make certain decisions under the Telecommunications Act of 1996, no doubt seeking to take advantage of their expertise as well as resources. Congress also authorized ordinary and limited judicial review of those agency decisions albeit in federal court. As discussed in Part I of this brief, what the Sixth Circuit's decision seeks to do is to extend *Ex parte Young* to provide federal review because, it acknowledges, abrogation and constructive waiver no longer apply in light of this Court's recent holdings. However, Petitioners argue persuasively that *Seminole Tribe* in fact prevents the Sixth Circuit's extention of *Ex parte Young*, with its broad powers designed to curb unlawful conduct, to replace the failed remedy of limited judicial review in federal court which Congress contemplated in 47 U.S.C. § 252(e)(6). Petition at 5-12.

[7] Petitioners argue that the Act's remedial scheme provides for only limited federal court review (i.e., relief to enforce "State commission" compliance with the Act), the *Ex parte Young* doctrine cannot be used to compel a State official to perform discretionary acts, and the Michigan Commission's past arbitration of an interconnection agreement authorized by section 252 of the Act cannot be characterized as an ongoing violation of federal law. Petition at iii. The Amici States endorse these arguments, but do not argue them in this brief so as not to burden the Court with repetitive arguments.

against state officials when the State is the real party in interest. Also, the suit should be dismissed because the State commission is an indispensable party under the Federal Rule of Civil Procedure 19(b). The non-applicability of *Ex parte Young* is further dictated by the availability of state courts to review State commission determinations for compliance with federal and state law.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. The Court of Appeals for the Sixth Circuit Has Misapplied the *Ex parte Young* Doctrine and Violated the Constitutional Doctrine of Sovereign Immunity

This suit is an appeal of an administrative agency decision taken by a party to the underlying state administrative agency proceeding. The appeal was lodged in federal district court pursuant to section 252(e)(6) of the Act. Section 252(e)(6) grants jurisdiction to federal district courts to review certain actions taken by a State commission. It provides in pertinent part: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6).[8]

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[8] Concomitantly, section 252(e)(4) of the Act purports to prohibit state court review of the same determinations. It provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4). The scope of this brief does not permit a full discussion of the infirmities of these provisions and their application in the federal courts. The Court should be aware, however, that there are pending challenges to the constitutionality of section 252(e)(4)'s prohibition of state court review of state administrative agency decisions. *E.g.*, *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, Nos.

It is an administrative agency, not individual officials within the agency, which defends its own decision when a party seeks judicial review of that decision.[9] Indeed, all members of a commission may not have concurred in the agency's decision. The agency is the real party in interest in such a proceeding, consistent with both federal and state law. Federal courts have routinely found state agencies to be the only proper party in an action challenging that agency's order.[10] Likewise, state laws routinely provide for appeals from State commission decisions to be filed directly and exclusively against State commissions.[11]

99-5839 and 99-5873 (6th Cir. filed June 14, 1999). The consequence of striking the prohibition is that State commission decisions under the Act would be reviewable in state courts for compliance with federal and state law, which is wholly appropriate.

[9] *But cf.* N.C. Gen. Stat. § 62-48(a) (providing that the North Carolina Utilities Commission takes no position upon appellate review of its quasi-judicial decisions where a utility had the burden of proof.)

[10] *See Ricci v. State Bd. of Law Examiners*, 569 F.2d 782, 784 (3d Cir. 1978) (Pennsylvania Supreme Court was indispensable party in proceeding to invalidate its rules); *Stevens v. Bartholomew*, 222 F.2d 804, 806 (D.C. Cir. 1955) (state agency managing highway project has sovereign immunity precluding injunction against federally-funded state highway authority); *Bomer-Blanks Lumber Co., Inc. v. Oryx Energy Corp.*, 837 F. Supp. 769, 770 (M.D. La. 1993) (collateral attack on agency's order made agency an indispensable party). Although this Court has not directly addressed this issue, it has implied that it would reach the same result. *See United Auto Workers v. Brock*, 477 U.S. 274, 291 (1986) (state agency enforcing federal law was not an indispensable party under Federal Rule of Civil Procedure 19 because the case was "not an appeal from an adverse benefit determination" under federal law).

[11] *See e.g.*, Ohio Rev. Code Ann. §§ 4903.12 & 4903.13 (Baldwin 2000) (Supreme Court of Ohio has exclusive jurisdiction to review orders of Public Utilities Commission of Ohio); Pennsylvania Const., Art. V, § 9 (guaranteeing right of appeal from a state administrative agency to the appropriate state court); 42 Pa. C.S. § 763 (providing for review of agency orders in the Commonwealth Court of Pennsylvania); and Kentucky Rev.

In this case, the agency itself was not named as a defendant, rather the suit was brought against the individual members of the Michigan Commission. Impermissibly, the Court of Appeals below sanctioned an obvious violation of the constitutional doctrine of sovereign immunity by allowing the complaint to proceed on the theory that this is a straightforward *Ex parte Young* case because the court found Michigan Bell Telephone Company d/b/a Ameritech Michigan (Ameritech) is seeking injunctive relief against "an ongoing violation of federal law." *Michigan Bell Tel.*, 202 F.3d at 868 (reproduced at Petition Appendix 10a).

In a subsequent decision, the Sixth Circuit gave further details about its rationale for applying the *Ex parte Young* doctrine in this case. The court opined:

> The Supreme Court's recent decisions in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, [527 U.S. 666 (1999)], and *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, [527 U.S. 627 (1999)], undermine earlier circuit court decisions holding that the Eleventh Amendment does not bar suits against state utility commissions because such commissions constructively waive their immunity from suit by participating in the regulatory scheme established by the [federal Telecommunications Act of 1996]. *See, e.g., MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 183 F.3d 567, 567-68 (7th Cir. 1999) (granting a petition for rehearing and directing the parties to file supplemental briefs on the impact that the Supreme Court's decisions in *Alden v. Maine*, [527 U.S. 706

Statutes, Ch. 278.410 (providing that Franklin Circuit Court is the exclusive forum for review of Kentucky Public Service Commission orders).

(1999)], and the *College Savings Bank* cases had on the court's earlier decisions).

> It is precisely because the waiver doctrine no longer provides a reliable basis for seeking relief against state commissions that we disagreed in *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d 862 (6th Cir. 2000), with the Seventh Circuit's decision in MCI and premised our conclusion that the plaintiff could proceed with its suit against the [Michigan Public Service Commission] solely on *Ex parte Young*, rather than waiver, grounds.

GTE North, Inc. v. Strand, 209 F.3d 909, 922 n.6 (6th Cir. 2000) (reproduced at Petition Appendix 62a, 79a. n.6).

The Amici States agree that this Court's holding in the *College Savings Bank* case has left no room to argue that the Michigan Commission constructively or implicitly waived sovereign immunity by participation in the regulatory scheme of the Act. Lacking jurisdiction over the Michigan Commission, the court below erred by asserting jurisdiction personally over the individual commissioners in their official capacities. The result is repugnant to our system of federalism and extends the *Ex parte Young* doctrine in impermissible ways.

A. *Ex parte Young* Does Not Permit a Suit to Go Forward Against State Officials When the State Is the Real Party in Interest

The State of Michigan, acting through its agency, the Michigan Public Service Commission, is the real party in interest in this case and is entitled to sovereign immunity. Because this suit is in reality a suit against the State of Michigan, this suit is not authorized under the *Ex parte Young* doctrine. "The Eleventh Amendment bars a suit against state officials when 'the state is the real party in interest.'" *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89,

101 (1984). *See* U.S. Const. amend. XI. Ameritech cannot avoid this jurisdictional bar by bringing a suit for injunctive relief against the individual members of the Michigan Commission instead of the Michigan Commission itself. A suit against the State is barred regardless of whether it seeks damages or injunctive relief. *Cory v. White*, 457 U.S. 85, 91 (1982).

The reality of the situation is obvious. Ameritech submitted itself to the Michigan Commission's jurisdiction seeking a determination on terms and conditions of an interconnection agreement with another jurisdictional carrier pursuant to sections 251 and 252 of the Act, 47 U.S.C. §§ 251, 252. Indeed, Congress required Ameritech to submit to the Michigan Commission's lawful jurisdiction over the matter. 47 U.S.C. §§ 153(41), 252(e)(1). After obtaining a determination, Ameritech believed the Michigan Commission had erred in the application of state and federal law and, therefore, sought relief in federal district court. Petition at 4.

The State commission acts in the public interest of the people within its State when a State commission makes a determination to approve or reject an interconnection agreement between regulated utilities. This Honorable Court has recognized that the regulation of utilities itself "is one of the most important of the functions traditionally associated with the police power of the states." *New Orleans Pub. Serv. Inc. v. New Orleans*, 491 U.S. 350, 365 (1989). The State's sovereign interest in the use of public rights-of-way is also implicated in the review of interconnection agreements, since utilities use public rights-of-way in the provisioning of service. 47 U.S.C. § 253. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997) (discussing Idaho's sovereign interest in land and water as preventing a suit against Idaho officials under *Ex parte Young*).

The plain language of the relevant portion of the Act[12] reveals the State's interest in the review of interconnection agreements. Under the Act, all interconnection agreements must be submitted to the State commission for approval. 47 U.S.C. § 252(e)(1). A State commission reviews the agreement to determine whether it (or any portion thereof) discriminates against a telecommunications carrier not a party to the agreement and to determine whether implementation of such agreement is consistent with the public interest, convenience, and necessity. 47 U.S.C. § 252(e)(2)(A). The public interest review includes compliance with the interconnection requirements of the Act, which requirements provide for compliance with applicable State laws. 47 U.S.C. §§ 252(e)(2)(B), 251(d)(3). The review also includes the establishment of rates, a matter particularly reserved for "States." *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 384 (1999). Other provisions specifically preserve state authority to regulate. See, e.g., 47 U.S.C. § 252(e)(3) (preserving a State commission's authority to establish and enforce requirements of state law in its review of an interconnection agreement), §§ 253(b)-(c) (preserving state authority to, *inter alia*, impose requirements necessary to protect the public safety and welfare and to manage public rights-of-way), § 254(f) (preserving state authority to advance universal service in that State), and §§ 261(b)-(c) (preserving generally existing state regulations and additional state requirements that are not inconsistent with the Act). *See also* 47 U.S.C. § 271(d)(2)(B) (requiring FCC consultation with State commission on special provisions concerning Bell Operating Companies).

This Court has stated, "When suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in

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[12] Development of Competitive Markets, 47 U.S.C. §§ 251 – 261 (West 2000).

the litigation whenever state policies or procedures are at stake." *Coeur d'Alene Tribe*, 521 U.S. at 269. The general rule is that a suit brought against state officials is a suit against the sovereign if the judgment sought would interfere with the public administration or restrain the State Government from acting. *Pennhurst*, 465 U.S. at 101 n.11.

Here, Ameritech seeks to interfere with the Michigan Commission's regulation of local telecommunications markets, thus, interfering with public administration or restraining the State Government from acting. Ameritech's position that the Michigan Commission, "acting through its Commissioners,"[13] violated federal and state law is an insufficient basis to consider the suit not to be against the State for the purposes of constitutional sovereign immunity, given the commission's authority to act on the matter. A claim of error in the official's exercise of delegated power is an insufficient basis for the suit to be allowed as an exception from the constitutional doctrine of sovereign immunity. *See Pennhurst*, 465 U.S. 89. The Court of Appeals below seeks to extend *Ex parte Young* to provide a substitute for ordinary judicial review of agency decisions Congress invited, if not directed, the State commission to make. This extension of *Ex parte Young* should be rejected by this Court.

The Court of Appeals below ignored the nature of the complaint and a State's public interest considerations attendant to the approval or rejection of an interconnection agreement. The court's error is captured in footnote 1 of its opinion wherein it describes as "not important," for purposes

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[13] Paragraph 1 of the underlying amended complaint for declaratory and other relief states: "This action is brought by Ameritech Michigan under § 252(e)(6) of the Telecommunications Act of 1996 . . . to challenge certain determinations *made by the Michigan Public Service Commission* ('Commission' or 'MPSC') *acting through its Commissioners*, in arbitrating and approving an interconnection agreement . . . ." (Emphasis added.)

of the jurisdictional question, the fact that Ameritech is complaining about Michigan-specific rates established by the Commission. Petition Appendix at 4a n.1. The court below turned a blind eye to the true nature of the complaint,[14] and any decision on the merits may well interfere with the Michigan Commission's ability to regulate in the public interest. This is not permissible.

B. Federal Rules Do Not Permit the Suit to Go Forward for Failure to Join an Indispensable Party

The Act, read as a whole, demonstrates Congress's intent that State commissions, not commissioners, be parties in federal court actions reviewing their determinations. *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315, 322 (7th Cir. 1999), *reh'g granted*, 183 F.3d 567 (7th Cir. 1999) (directing parties to file supplemental briefs addressing the applicability of *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.* and other recent cases). Section 252(e)(6), the statutory basis for this suit, addresses judicial review of "State commission" actions and never once refers to individual commissioners. 47 U.S.C. § 252(e)(6). *See also* 47 U.S.C. § 252(e)(4) (attempting to strip state courts of their power to review State commission determinations as part of the scheme to transfer appeals of decisions that would ordinarily be defended by the State commission in state court to the federal court arena). Where Congress created a limited remedy for aggrieved parties, the federal courts may not substitute *Ex parte Young* as a

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[14] The nature of this suit is an ordinary appeal from an administrative agency determination raising a question as to whether the Michigan Commission correctly applied federal and state law in making its determination.

substitute if that remedy fails. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

Congress preserved a primary role for State commissions throughout the process of interconnection agreement review that is unique. No regulated carrier shares a State commission's interest in this type of case. A State commission's interest goes beyond a utility's narrow business interest to the broad public interest. To say that the relevant State commission is not the real party in interest in a subsequent court action adjudicating the propriety of the entire interconnection agreement review process is an unreasonable construction of the Act. If the public interest review of a State commission is irrelevant to the outcome, Congress simply would have required private party arbitrations without any commission involvement.

Not only is the State commission a proper party under the Act, but it is also an indispensable party under Federal Rule of Civil Procedure 19(b).[15] In other words, the State commission is not just the real party in interest, but also an indispensable party, notwithstanding sovereign immunity. But because that immunity precludes suit against a State commission in federal court, this suit should have been dismissed for inability to join the indispensable party under Rule 19. *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1349 (6th Cir. 1993); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991).

Since a State commission is an indispensable party to a federal court action challenging the validity of a State commission determination under section 252(e)(6) of the Act, the case now before this Court should have been dismissed.

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[15] The U.S. Court of Appeals for the Fourth Circuit ordered supplemental briefing on this issue. *BellSouth Telecommunications*, Nos. 99-1845 *et al.* (order issued May 2, 2000) and *Bell Atlantic-Maryland*, Nos. 99-2459, *et al.* (order issued May 2, 2000).

Dismissal was necessary due to the sovereign immunity enjoyed by the State of Michigan (absent the Commission's voluntary consent to federal court jurisdiction). The Court of Appeals below apparently recognized that Congress lacks the power to subject non-consenting State commissions to the jurisdiction of federal district courts pursuant to 47 U.S.C. § 252(e)(6).[16] *GTE North Inc.*, 209 F.3d at 922 n.6. Impermissibly, the Sixth Circuit panel attempted to resurrect Congress's unconstitutional abrogation attempt by allowing the suit to proceed against the individual commissioners under *Ex parte Young*.

The Sixth Circuit's jurisdictional end-run in this case was plainly acknowledged in its subsequent decision in *GTE North*, 209 F.3d at 922 n.6 (explaining that the Sixth Circuit had asserted jurisdiction on the basis of *Ex parte Young* in the *Climax Telephone* case now before this Court because the waiver/abrogration scheme of section 252(e)(6) is unlawful). Clearly, the assertion of jurisdiction was error. The Court of Appeals should not disregard the intent of Congress, the immunity of the States, and the Federal Rules of Civil Procedure merely to salvage a jurisdictional basis for this action.

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[16] When the 1996 Act was passed, Congress apparently believed it had Article III power to abrogate state sovereign immunity, based on *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). *Union Gas* was subsequently overruled in *Seminole Tribe*, 517 U.S. 44 (1996), when the Court found that the Commerce Clause did not provide a lawful basis for Congress to abrogate State immunity. Finally, the Court has abolished the doctrine of constructive waiver, thereby eliminating the only remaining argument supporting the validity of section 252(e)(6)'s attempted abrogation. *See College Savings Bank*, 527 U.S. 666 (1999).

II. Application of *Ex parte Young* Doctrine Is Not Necessary to Vindicate Federal Law

The non-application of the *Ex parte Young* doctrine is further dictated by the availability of state court review, notwithstanding Congress's attempt to prohibit such review. It is well established that state courts are presumed competent to review lower tribunal determinations for compliance with federal and state law. *Williams v. Taylor*, ___ U.S. ___, 120 S. Ct. 1479, 1491 (2000) (stating that state courts should have "their rightful opportunity to adjudicate federal rights"); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 486 n.7 (1999) (noting that state courts "can and do decide questions of federal law"); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962) (acknowledging "the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law"); *Pennsylvania Elec. Co. v. Pennsylvania Pub. Util. Comm'n*, 544 Pa. 475, 677 A.2d 831, 832 (1996) (reviewing State commission determination for compliance with federal law). It is also well established that courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). In cases under section 252 of the Act, there is no firm basis to depart from these basic tenets of law.

The present impediment to state court review — an impediment created by Congress and found in section 252(e)(4) of the Act (purporting to prohibit state court review) — cannot withstand judicial scrutiny. At least two challenges to the constitutionality of section 252(e)(4), 47 U.S.C. § 252(e)(4), are pending in a federal appellate court. *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, Nos. 99-5839 and 99-5873 (6th Cir. filed June 14, 1999); *Wisconsin Bell, Inc. v. Public Serv. Comm'n*

of Wisconsin, Nos. 99-2805 *et al.* (7th Cir. filed July 21, 1999).[17] Essentially, the challengers argue that the Tenth Amendment to the U.S. Constitution reserves to the States the power to review the determinations of a state agency and that Congress has attempted impermissibly to interfere with a State's authority over its agencies. *See* U.S. Const. amend. X.

It is acknowledged that the underlying proceeding in this case did not address the constitutionality of section 252(e)(4). However, the Amici States bring this issue to the Court's attention to alleviate any possible concern about a utility's ability to obtain judicial review of a State commission determination if *Ex parte Young* is not applied to lift the sovereign immunity jurisdictional bar.

The Amici States submit that the Court of Appeals below erred in asserting jurisdiction on the basis of the *Ex parte Young* doctrine for this reason and the others stated above.

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[17] The Pennsylvania Public Utility Commission also has challenged the constitutionality of section 252(e)(4) in a federal court action brought under section 252(e)(6). Recently, the U.S. Court of Appeals for the Third Circuit dismissed the commission's challenge as moot due to a settlement on the merits between the disputing utilities. *Bell Atlantic-Pa., Inc. v. Nextlink Pa., L.L.P.*, No. 99-1520 (3d Cir. June 5, 2000) (order dismissing appeal and remanding to district court with directions to vacate its adverse decision and dismiss case).

CONCLUSION

For the foregoing reasons, this Court should grant the petition of the Commissioners of the Michigan Public Service Commission for a Writ of Certiorari.

Respectfully submitted,

MARYANNE REYNOLDS MARTIN *
Assistant Counsel
CARL S. HISIRO, Assistant Counsel
FRANK B. WILMARTH, Deputy Chief
BOHDAN R. PANKIW, Chief Counsel
203 North Office Building
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

* *Counsel of Record On Behalf of Amici States*

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